DATE: December 15, 1998

CASE NO: **1998-MSA-10**

In the Matter of:

FREEMAN UNITED COAL MINING CO., [CROWN III MINE]
Petitioner

and

MINE SAFETY AND HEALTH ADMINISTRATION
Party In Interest

Before: JOHN M. VITTONE
Chief Administrative Law Judge

DECISION AND ORDER

This proceeding arises under Section 101(c) of the Federal Mine Safety and Health Act of 1977, ("Act" or "Mine Act"), 30 U.S.C. §§ 811(c), and its implementing regulations at 30 C.F.R. Part 44. Congress adopted the Mine Act "to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. § 801(g). It requires the Secretary of Labor to develop detailed mandatory health and safety standards to govern the operation of the Nation's mines. 30 U.S.C. § 811. Freeman United Coal Mining Company ("Freeman" or "Petitioner")[1] filed a petition for modification of the application of the mandatory safety standards of 30 C.F.R. § 75.333(a)(2) as pertains to the Crown III Mine ("Mine") in Montgomery County, Farmersville, Illinois.

The following decision is based upon a consideration of the entire record and states all facts officially noticed and relied upon as required by 30 C.F.R. § 44.32(b). The decision is made on the basis of a preponderance of all available, reliable and probative evidence.

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[1]Freeman United Coal Mining Company is a subsidiary, fully owned by Freeman Energy; which is a subsidiary, fully owned by General Dynamics Corporation. (*Tr. at 15*).

Statement of the Case

On August 26, 1997, Freeman United Coal Mine Company, the owner and operator of the Crown III Mine, filed a petition for modification of the application of 30 C.F.R. § 75.332(a)(2) to the Crown III Mine to allow one continuous miner to cleanup the working face previously mined while the other continuous miner on the supersection[2] starts to cut and load coal from another working face on the same working section, on the same split of air. The petition alleges that the proposed alternative method will at all times provide the same measure of protection as the standard.

The mandatory safety standard of § 75.333(a)(2) prohibits certain simultaneous operations by two sets of mining equipment on the same split of air.[3] Freeman has asked the Secretary of Labor, through its delegate to the Mine Safety and Health Administration, to grant its petition for modification of the safety standard. The standard is intended to protect miners from dust and methane gas that might be generated by one continuous miner contaminating the air in one working area, and then having another working area ventilated with the same air.

The U.S. Department of Labor, Mine Safety and Health Administration ("MSHA") personnel conducted an investigation into the merits of the petition[4] during October, 1997, and filed a report on November 3, 1997, of their findings and recommendations with the Administrator for Coal Mine

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[2]A normal mining section consists, generally, of one continuous miner, haulage equipment, roof bolting equipment, and scoops. The supersection at the Crown III Mine uses two continuous miners, four battery cars, three roof bolting machines, and two battery scoops. The Mine supersection is currently operated on a single split of air and production is alternated between the two, continuous miners. (*Tr. at 25-26*).

[3]Specifically, Section 75.332(a)(2) of Title 30 of the Code of Federal Regulations provides:

> When two or more sets of mining equipment are simultaneously engaged in cutting, mining, or loading coal or rock from working places within the same working section, each set of mining equipment shall be on a separate split of intake air.

[4]Sections § 75.300 *et seq.* of Thirty C.F.R. are provisions of the regulations which give the Secretary of Labor oversight of the ventilation system of every coal mine. These extensive and technical provisions establish criteria upon which the Secretary shall review and approve for each coal mine a ventilation plan which is suited to the mine's particular system and conditions. The Secretary must review the plan every six months in order to ensure that air quality and ventilation requirements are being met. The provisions give the Secretary the enforcement tools needed to assure the coal mining companies are planning and ventilating their mines in a safe manner.

Safety and Health. After review of the entire record, Robert A. Elam, the Deputy Administrator for Coal Mine Safety and Health, issued a *Proposed Decision and Order* on February 26, 1998, denying the petition. The decision concluded that Freeman's proposed method does not provide a substantive alternative designed to result in the same safety goals with the same degree of success. The Deputy Administrator found the petition to be a request for a *waiver* of Section 75.332(a)(2), which prohibits the simultaneous loading of coal or rock, or mining or cutting of two continuous miners on the same split of air within the working section, rather than a *modification* of the standard.

MSHA's investigation revealed that the clean-up continuous miner will be loading coal and rock, and is also likely to be cutting bottom during the "clean-up" operation while another continuous miner continues to cut coal. MSHA's contention is that such activity is actually the simultaneous cutting of additional coal – an operation which the standard was intended to prohibit because of the increased dust and methane hazards. MSHA found that the proposed alternative method, if implemented, would not be in agreement with the intent of 30 CFR § 75.332(a)(2) because of the increased dust levels and increased fire and explosion exposure. MSHA concluded that split section ventilation and other allowable mining methods would achieve petitioner's objective, and is not precluded by the standard.

Freeman appealed the *Proposed Decision And Order* on March 30, 1998, contending that the Deputy Administrator's findings are not supported by fact and law. A hearing on the appeal was held before the undersigned on July 21 and July 22, 1998 in Springfield, Illinois. On August 4, 1998, the parties, with the undersigned's consent, agreed to waive post-hearing briefs.

Findings of Fact and Conclusions of Law

I.

The Crown III Mine[5], which began operation in 1981, is located in the city of Farmersville in Montgomery County, Illinois. The mine is opened by two shafts and one slope into the Illinois Herrin No. 6 Seam[6] that averages eighty-four inches in thickness in the area being mined. The overburden in this area averages 370 feet. Freeman operates the mine on three shifts per day, six days per week.[7] The Crown III Mine is a large mine employing two operating sections which develop

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[5]The Crown III Mine is one of three active mines currently operated by Freeman. (*Tr. at 15*). The Crown II Mine is located in Burton, Illinois, and the third mine is located in Industry, Illinois. (*Tr. at 15-16*).

[6]"Herrin" is the name given to the particular coal seam mined by Freeman. There are several coal seams in Illinois. The Herrin No. 6 Seam is the largest ranging coal seam and the most frequently mined coal seam in Illinois. (*Tr. at 21*).

[7]There are three shifts in a 24-hour day. Two of the shifts rotate between day shift and second shift. In other words, one shift begins at 8:00 a.m. and ends at 4:00 p.m.; the other shift

entries and rooms with remote control continuous miners. One section operates two shifts per day, day and afternoon shift, and the other section mines on all three shifts. The mine produces about 6,200 tons of clean coal daily with the five machine production shifts.[8] Diesel-powered rubber-tired equipment is used throughout the mine for transportation of personnel and equipment. Battery-powered rubber-tired personnel carriers are also used underground on a limited basis.

The Mine employs an exhaust main mine fan ventilation system using one fan on the upcast shaft. The intake shaft is used for downcasting air and for personnel and materials. Coal is transported from the sections via an underground belt conveyor system and out of the mine through the slope. The slope is primarily for belting the coal out of the mine but is also part of the alternate escapeway. Employment is provided for 168 persons of which 149 miners work underground.[9] Approximately eighty individuals are directly related to coal production. Twenty-seven of the employees at the Mine are salaried; the rest are union members of the United Mine Workers of America ("UMWA"). (*Tr. at 22*).

The mining system employed consists of multiple entry main and submain development and multiple entry panel and room development. The Mine currently operates two supersection continuous miner sections in rooms and pillar development. Each supersection uses two continuous mining machines, two double-room bolting machines, four battery ram car coal haulers, two battery scoops, and one end-dump feeder/breaker. The sections use a single split of intake air that flows from right to left across the section. Freeman does not plan to use a split or "fish-tail" face ventilation system at this mine. Mining machines are equipped with flooded-bed scrubbers and sections use a blowing-type face ventilation system. The belt entry and travelway entry are isolated together in the same split of intake air which is coursed into the return air flow at specific loading points.

To insure compliance with 30 C.F.R. § 75.400,[10] the cleanup of combustible material, and to

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begins at 4:00 p.m. and ends at midnight. The workers in these two shifts rotate. The third shift, termed the "midnight shift," is a steady shift that commences at midnight and ends at 8:00 a.m. Freeman runs two unit shifts on each of the two, rotating shifts, and one unit shift on the midnight shift, for a total of five shifts. (*Tr. at 22-23*). Coal is normally produced on the average of five-and-a-half days per week. The Mine may run six days one week and five days the next. (*Tr. at 23*).

[8]In 1997, the Crown III Mine produced approximately 1.7 million tons of coal. (*Tr. at 24*).

[9]Total employment for Freeman is approximately 506 individuals; approximately 460 are engaged in the actual coal mining production operations at the Freeman mines. (*Tr. at 16*).

[10]30 C.F.R. § 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted

provide a safe work environment for the roof bolters supporting the mine roof to work, the Mine currently operates with continuous miner cleaning up the working face immediately after it is mined.[11] (*See Petitioner's Exhibit 2-3*).

Freeman has petitioned the following alternative method:[12]

1. Freeman proposes to cleanup the working face immediately after mining with the continuous miner. The rock and coal will be loaded from the mine floor into a shuttle car or battery coal hauler.

2. The continuous miner will not cut the roof, ribs, face, or bottom[13] during the cleanup phase as it is loading out the loose coal and rock on the mine floor.

3. When the continuous miner ceases mining coal from the face and starts the cleanup process described in 1. and 2., above, the second miner on the supersection will begin the mining process. Before starting the second miner, the first miner will be retreating out of the cut area to begin the cleanup process. At this point, radio communications will be used to contract the second miner and

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> surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

[11]If the working face is not cleaned up or the material is not pushed up to the face, roof bolters are subject to uneven mine floor and stumbling and tripping hazards as well as the hazard of tramming the roof bolter into the face over piles of loose rock. (*Petitioner's Exhibit 2-3*).

When coal and rock is pushed up to the fact of the Mine with the continuos miner, rather than loading it out, an area of unsupported roof six to ten feet in length back from the face is created. Apparently, this presents a problem examining the face and creates a hazard of unsupported roof. When twenty to twenty-five feet is mined in addition to the six to ten feet of area than cannot be supported as a result of material being pushed up to the face, a total area of roof twenty-six to thirty-five feet in length is exposed. This apparently negates the improved roof control that is achieved with shorter cutting depths. Maximum cutting depth is specified in the roof control plan. (*See Petitioner's Exhibit 2-3*).

[12]*See Petitioner's Exhibit 2-4* (Petition for Modification of Mandatory Standard 30 C.F.R. § 75.332(a)(2)).

[13]In the petition for modification, dated August 11, 1997, Freeman did not *specifically* indicate it would not cut bottom in the cleanup process. However, at the hearing on July 21, 1998, Vice President of Operations, Neal A. Merrifield, testified that Freeman is willing to stipulate that the continuous miner will not cut bottom. (*Tr. at 65*).

inform them that they may start the cutting process. Mining with the second miner will not be allowed until there has been radio communication.

4. If adverse roof conditions which require the trimming of roof with the miner are encountered during the clean up process, the continuous miner that is cutting and loading coal will be stopped while the roof is being trimmed with the other miner in the clean up cut.

In support of its alternative method, Freeman asserts the following:[14]

1. By reducing the depth of the cuts, where necessary for adverse roof conditions, less roof is left exposed, unsupported, thus contributing to the better roof conditions.

2. Good cleanup in the face area makes it safer to roof bolt and reduces stumbling hazards.

3. With the continuous miner not cutting coal or rock from the roof, face, ribs, or bottom,[15] the amount of dust generated during the cleanup process will be minimal. Water sprays and scrubbers will be employed during the cleanup process to further suppress respirable dust. To ensure that an over-exposure does not develop from the concentration of respirable dust, the downwind machine shall be randomly sampled by MSHA while the upwind machine is cutting coal to ascertain compliance with the 2.0 mg/m3 standard.

4. Methane liberation during the cleanup phase of the mining cycle will be very minimal. Ventilation during the cleanup process will be maintained to the face with the use of a scrubber on the continuous miner. A minimum of 5,000 c.f.m. shall be maintained at all times during the cleanup process.

II.

Petitions for modifications are governed by §101(c) of the Act. Section 101(c) provides in pertinent part:

> Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine . . . .

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[14]*Id.*

[15]*See Footnote 5, supra.*

Thirty C.F.R. § 44.4 is the regulation implementing §101(c). It provides:

> (a) A petition for modification of application of a mandatory safety standard may be granted upon a determination that–
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> > (1) An alternative method of achieving the result of the standard exists that will at all times guarantee no less than the same protection afforded by the standard, or
> >
> > (2) Application of the standard will result in a diminution of safety to the miners.

Freeman, as a party seeking a modification of a mandatory safety standard, has the burden of proof by a preponderance of the evidence. 30 C.F.R. § 44.30. Freeman must show that allowing one continuous miner to cleanup the working face previously mined while the other continuous miner on the supersection starts to cut and load coal from another working face on the same working section, on the same split of air, achieves the same level of protection afforded the miners as the mandatory safety standard of § 75.333(a)(2). Section 75.332(a)(2) of Title 30 of the Code of Federal Regulations provides:

> When two or more sets of mining equipment are simultaneously engaged in cutting, mining, or loading coal or rock from working places within the same working section, each set of mining equipment shall be on a separate split of intake air.

According to Freeman, the Administrator's decision to reject the alternate plan is unjustified as the plan achieves mine safety at least equivalent to the regulatory standard.

Specifically, Freeman maintains that the proposed decision and order (1) does not take into account the views of the miners; (2) assumes that Freeman would cut coal simultaneously with two continuous mining machines. The continuous mining machine that could be cleaning up would be performing the same function as a scoop; it would not cut coal from the bottom[16], ribs, face or roof during its clean-up work; (3) errs by speculating that operation in a Crown III Mine supersection of a continuous miner to clean-up loose coal in a working place while a second continuous mining machine is cutting coal downwind would expose miners downwind in the section to methane and excessive dust; (4) errs in evaluating the net safety effects of the proposed modification; and (5) does not recognize the benefits of the proposed modification.

III.

[16]*See Footnote 13, supra.*

In relevant part, Section 101(c) of the Mine Safety Act authorizes modification of a safety standard at a particular mine when it is determined that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard. 30 U.S.C. § 811(c). This provision calls for a two-step analysis of any proposed modification.[17] *See UMWA, International Union, v. MSHA*, 928 F.2d 1200 (D.C. Cir. 1991).

The first step, corresponding to Section 101(c)'s "result" clause, requires a finding that the proposed alternative method will promote the same safety goals as the original standard with no less than the same degree of success. The second step, keyed to Section 101(c)'s "same measure of protection" requirement, contemplates a more global inquiry into the net safety effect of the modification. Taking into account both advantages and disadvantages of the alternative method, including effects unrelated to the goals of the original standard, the effect on overall mine safety must be considered. Within these directives, I find that the Administrator must review the specific circumstances of each case when reviewing a petition for modification. *See* 30 U.S.C. § 811(c); *see also International Union, UMWA v. Federal Mine Safety and Health Admin.* 924 F.2d 340, 343 (D.C. Cir. 1991).

The "Result" Clause

Freeman contends that the Administrator's decision to reject the alternate method is unfounded because such a proposed method at all times guarantees no less than the same measure of protection afforded the miners under 30 C.F.R. § 75.332(a)(2). In making a determination as to whether the alternate method satisfies this part of the analysis, it is important to ascertain whether Freeman would cut coal simultaneously with two continuous mining machines.

To this end, Freeman has agreed not to run both miners cutting coal simultaneously. Neal A. Merrifield, the Vice President of Operations for Freeman,[18] testified that the company "would be happy to stipulate that the continuous miner will not cut bottom when cleaning up." (*Tr. at 65*). It is clear from the record and the Petition that the continuous mining machine would be performing the

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[17]Specifically, the court in *International Union, UMWA v. MSHA*, 928 F.2d 1200 (D.C. Cir. 1991) discussed the analysis that MSHA must undertake in its application of the second inquiry of §101(c). The court held that the Assistant Secretary must make distinct findings on whether, considering all the effects of the proposed alternate method, both positive and negative, modification would achieve a net gain, or at least equivalency, in overall mine safety. Thus, the Administrator must inquire into the net safety effect of the proposed alternate method.

[18]Mr. Merrifield testified on behalf of Freeman as an expert on underground coal mining operation. He currently oversees the operation of all of Freeman's coal mines, including the production and safety programs at the mines. He has been working in the coal industry for thirty years.

same function as a scoop;[19] it would not cut coal from the bottom, ribs, face or roof during its clean-up work.

Further, it is crucial to carefully examine and consider the resulting exposure to methane and dust under the proposed alternative method. It is quite consequential to determine whether MSHA erred by speculating that operation in a Crown III Mine supersection of a continuous miner to clean-up loose coal in a working place (while a second continuous mining machine is cutting coal downwind) would expose miners downwind in the section to methane and excessive dust. In support of Freeman's position to refute MSHA's findings, Mr. Merrifield testified that methane is not a major concern at the Mine. Specifically, he opined that

> [Freeman has] very effective ventilation. We have over capacity ventilation because the mine was originally designed to operated more than two sections. There is very little methane that is generated at Crown III Mine. (*Tr. at 26*).

The testimony of Phillip Robert Ott, Superintendent of the Crown III Mine,[20] is also persuasive and credible. It further reveals that the there will be no increase of respirable dust if the clean up takes place on the same split of air as production with another mine; nor will there be additional exposure to methane. (*See tr. at 114-115*). Basically, it is "just a matter of the timing and the mine is -- essentially not a very gassy mine." (*Tr. at 115*). Similarly, Thomas J. Austin, Safety Director for Freeman since 1987,[21] testified that the "mine liberates a very low amount of methane." (*Tr. at 158*).

Upon examination of the record, I note additionally that the mine face equipment, including continuous mining machines, is equipped with the methane detection devices as required by 30 C.F.R. § 75.342. Such devices warn of methane concentrations of 1% and deenergize equipment if a methane concentration of 2% is detected. (*See Petitioner's Exhibits 16-1 to 16-10*; *see also tr. at 174-182*). Crown III is required by 30 C.F.R. § 70.100(a) to continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the

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[19]With respect to the function of a scoop versus the function of a continuous mining machine, Mr. Merrifield testified as follows:

> I mean it is a different piece of equipment, but they are doing exactly the same part of the mining cycle. They are removing and cleaning material. (*Tr. at 74*).

According to Merrifield, the continuous miner will create no additional dust than a scoop would create. (*Tr. at 75*).

[20]Mr. Ott testified as an expert on behalf of Freeman on operations and equipment used in the supersections at the Crown III Mine.

[21]Mr. Austin testified as an expert on behalf of Freeman on coal mine operations and safety.

active workings is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air. Operation under the proposed alternative method would comply with that requirement. (*See Petitioner's Exhibits 14-1 to 14-3, 15-1 to 15-32, and 16-1 to 16-10*).

Regarding such detection, Mr. Austin testified as follows:

> Checks are made with a hand-held detector at the start of the shift, prior to energizing the equipment on the section. Checks are made at – and these checks are made in the working faces or in the faces of the section. Checks are also made prior to energizing equipment in the working face. Checks are also made while that equipment is energized at 20-minute intervals. So the operator or the supervisor will make a check while the piece of equipment is in place. Checks are made by the mine examiner. Each of the sections are required to be examined three hours prior to the oncoming shift. Fact checks are made by that mine examiner. Faces that the continuous miner operates in are also continuously monitored with the methane monitor that is mounted on the miner . . . [and] [y]es, the check continuous cutting or cleaning. (*Tr. at 159*).

Additionally, the regulations and mandatory provisions of the Mine ventilation plan require ventilation adequate to dilute and render methane harmless. The methane is then carried away from working places. Such a ventilation method is approved and enforced by MSHA. MSHA's own investigation report acknowledged that "[i]t is reasonable to expect that methane liberation would be minimal during the clean-up process." (*Petitioner's Exhibit 5-10*).

With respect to the control of respirable dust on the Mine's supersections, Mr. Austin testified that Freeman "[has] a dust control plan that is part of a ventilation plan. That dust control plan and ventilation plant dictate air quantities." (*Tr. at 170*). He also stated that there is no difference between the respirable dust and methane that would be created through clean up by a scoop and clean up by a mining machine. (*Tr. at 200*). Moreover, Donald William Mitchell,[22] a consultant to the mine industry, testified that a scoop would create a "higher respirable dust concentration total" for the Mine supersection than a continuous mining machine. (*Tr. at 228-229*). According to Mr. Mitchell, operation under the petition would be as safe as the present operating system. He opines the following:

> [I]t would not only be as safe, but there is a potential for being safer than in the event – if one assumes that for some reason the company elected to say use scoops for clean up in lieu of a continuous miner. I would say that would represent a less safe condition than is present. And what has been going on now, with a continuous miner, it makes no difference whether that miner is doing it simultaneously or some minutes

[22]Mr. Mitchell testified on behalf of Freeman as an expert in underground coal mine ventilation, in methane including the hazards, its detection and its controls, in the area of mine fires and explosions, in the area of coal mining equipment, and in the area of coal mine operations and coal mine safety.

before the mining operation starts with other machine. (*Tr. at 244-245*).

Finally, it is worth reiterating that during clean-up operations by the upwind continuous mining machine, coal dust, including respirable dust, will be suppressed by mandatory use of machine-mounted water sprays and scrubbers. According to Mr. Merrifield, the "water sprays actually knock down the dust and direct the dust, in addition with the ventilation that is brought in, away from the employees in the location where the coal is being mined and keeping them at bay from risk of health – from dust." (*Tr. at 71*).

I find that the generation of dust and liberation of methane, if any, by operation of a continuous mining machine to clean-up (without cutting coal) is no different than the operation of any piece of face equipment at Crown III for clean up purposes.

The "Same Measure of Protection" Requirement

Upon further review of the testimony and evidence, I find that MSHA erred in evaluating the net safety effects of the proposed alternative. Mr. Merrifield, arguing in favor of increased safety, testified as follows:

> In 1995, we realized there was a need to increase production at Crown III. We had looked at several methods that would also increase safety. Crown III has always historically been a safe coal mine, but we wanted to even further improve the safety standards for the employees at Crown III Mine. We evaluated several different methods of mining systems in order to achieve our goal of improved safety and improved production. (*Tr. at 49*).
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> [W]e tried to design a mining system that would improve our roof control . . . [W]e were operating the mine with one single miner section. We were allowed in our roof control plan to cut 40 foot with that continuous miner in an entry, prior to backing the miner out and roof bolting. We found that it was difficult always to hold the roof when mining those types of distances with a single miner section. In a supersection because there are two continuous miners, we felt that we could minimize the length of cut, improve roof conditions, and still increase productivity because the second machine could start mining immediately after the first machine would stop mining. And you would save all your travel time – that is incurred by a single machine mining from place to place. An thus, we felt that the <u>best overall selection for production improvement and safety improvement</u> of all the different mining cycles available to Crown III for utilization, would be a supersection. It would increase productivity and also improve safety for the employees operating the equipment. (*Tr. at 51-52*) (Emphasis added).

I find that Freeman took measures to inquire into and investigate the safety measures of the proposed modification. It is apparent that the operations of other mining companies were, at least

somewhat, evaluated on a conscientious level. Evidently, after looking at what several companies were doing and drawing on their "own experiences," Freeman decided the supersection was the best mining system for Crown III. (*See Merrifield testimony, tr. at 52).* Mr. Ott testified about Freeman's consideration and investigation of other mines as follows:

> We visited several different mines. We were looking at equipment as well as methods used at other mines. We did some time study analysis of our present – what was then our present operations, with the single miner on a unit; so that we would evaluate what percentages of time were spent in each part of the mining cycle . . .When doing so, we talked about the supersection. We looked at continuous haulage. We looked at fishtail supersections. We looked at all of them. And we thought – well, the supersection we decided on was going to be the safest and most efficient manner to produce coal. And at that time, the clean up and loading of coal was permitted by MSHA in this area and we made – based on our decision to go with that method on that. (*Tr. at 106-107*).

Moreover, MSHA's own witness, Mark O. Eslinger, an MSHA Supervisory Mining Engineer,[23] testified on direct examination that operation under the petition would not be unsafe. Specifically:

> Oh, I really don't think it's unsafe. I think the question here is whether it's as safe as. You know, it's not what I would really call unsafe. When we look at the petitioning process and when I was talking with Mark Odum when we were looking at the petition, you know, we had to go in there and gather the facts. We really didn't make the decision in District 8 whether the petition should be granted or not granted. What we are trying – you know, to me the measure was is it equivalent or better safety than – is the alternate method providing equivalent or better safety than the actual standard itself. (*Tr. at 294-295*).
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> . . . . .
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> Well, we thought that it was not an unsafe practice. We just didn't think it quite measured up. We really didn't see that they provided an alternate method and we thought that there was just a little bit less safety involved in the alternate method as they see it or what they wanted to do. (*Tr. at 295*).

In analyzing the net safety effects of the petition, it is important to explain some of the details of the proposed alternative. First, as previously discussed, no cutting or grading of the mine floor in working places will occur at the Crown III Mine while a downwind continuous mining machine is operating. I again note that the working sections at Crown III, where a continuous mining machine would be cleaning up while a downwind continuous mining machine is cutting coal, must keep

[23]Mr. Eslinger testified on behalf of MSHA as an expert in mine health and safety.

respirable dust concentrations within the limit specified in 30 C.F.R. § 70.100(a). Furthermore, I do not find there to be an elevated concern of an increased chance of methane liberation. MSHA's claim that coal will be cut by the upwind mining machine when it cleans up a working face is, as discussed above, not supported by the record. Freeman has agreed to stipulated that such a practice will not take place.

Second, I do not conclude that an "additional ignition source" should be considered in an unfavorable light. MSHA contends that permitting two continuous mining machines allows an additional ignition source within one split of air, with an increased chance of methane liberation. However, nothing in the regulations limits the number of continuous mining machines that may be located in one split in a working section. In any event, all electrical equipment operated in or by the last open crosscut – including continuous mining machines – must be maintained in permissible condition. 30 C.F.R. § 75.500.

Third, MSHA makes unconvincing arguments. The *Proposed Decision and Order* maintains that the MSHA investigators saw pull-through curtains opened to allow ram car operators to see through the area, causing a short-circuit of air for ventilation of the downwind face. The *Proposed Decision and Order* does not recognize, however, that pull-through curtains are not required by the Crown III ventilation plan. Mr. Merrifield testified that the optional curtains "are for ventilation controls . . . over and beyond the permanent stopping and the temporary curtains."[24] (*Tr. at 69*). In any event, the "short-circuit" did not affect the quantity of air MSHA requires behind the line curtain in the downwind face. In any matter, Freeman has agreed to use see-through curtains to give ram car operators better visibility.

Finally, as part of its operating requirements, Freeman has agreed that direct radio communication will be available between the working places when a continuous mining machine is cleaning up upwind from a continuous mining machine that is cutting coal. Mr. Merrifield testified that reliable radio equipment, for additional safety protection, would be implemented between the operators of the various different pieces of equipment and their supervisor. There would be immediate contact and no mistake as to when one miner is running and when one is not. (*See tr. at 75; see also tr. at 131* [Ott testimony]).

The evidence is convincing and I agree with the contention of Mr. Ott that "cleaning up with a continuous mining machine while another continuous mining machine is cutting coal, is as safe as not cleaning it up with a continuous mining machine while the other machine is mining coal." (*See tr. at 131* [Ott responding that such a practice is "just as safe."]). MSHA does not recognize the benefits of operating under the proposed alternative. First, less movement of large equipment in confined areas will occur, reducing the potential for crushing or pinching accidents and hazards from running over electrical trailing cables. Second, a cleaner bottom in face areas for roof bolting work will result, reducing slip and fall hazards. Finally, constant methane monitoring in working places will

[24]Neal Merrifield further testified that Freeman would stipulate that the pull-through curtains would be installed at all times if the Petition would be granted. (*Tr. at 70*).

result after coal is mined from faces because the continuous mining machine that would be used for cleanup is equipped with a methane detector and would remain in, or by, the last open crosscut for two of the three activities of the mining cycle.

I conclude that all of the effects of the alternative method, both positive and negative, will achieve at least the same in overall mine safety. Upon careful and meticulous consideration, I find that, at all times, no less than the same measure of protection afforded the miners under 30 C.F.R. § 75.332(a)(2) will be guaranteed by allowing the Crown III Mine to operate as proposed in Freeman's petition for modification.

Lastly, it is worth re-emphasizing: Congress enacted the Mine Act for the "health and safety of the Nation's coal or other miners." 30 U.S.C. § 801(g). It is thus important to consider the views of the miners. The UMWA, in representing the interests and views of the Crown III miners, favors the alternative method.[25] Mr. Merrifield declared that "[i]f you go down and actually talk to the workers themselves, which I have on several occasions personally; the men themselves have told me that they don't understand why we can't do this type of method that we have asked for in the Petition." (*Tr. at 89*). MSHA's investigative report confirms this fact. According to the report, "[s]everal of the miners were interviewed during the investigation and all were in support of the petition." (*Petitioner's Exhibit 5-4*). Moreover, as indicated in the report, Joe Urban, UMWA Regional Deputy Director, and Nat Bryce, UMWA Local Representative, have expressed their support of the petition. (*See tr. at 96* and *Petitioner's Exhibit 5-4*). While the decision to grant the petition does not turn solely on the fact that the miners are in favor of it, such is certainly a consideration.

ORDER

On detailed consideration of the petition for modification, including testimony relating to such petition, considering both positive and negative effects of the alternative method, and upon evaluation of the evidentiary record, the undersigned has determined that the alternative method proposed by the petitioner will at all times achieve net gain or at least equivalence in overall mine safety no less than the same measure of protection afforded by the standard**.**

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[25]The Crown III petition to modify § 76.332(a)(2) was jointly filed by Freeman and by the UMWA. (*See* Testimony of Neal A. Merrifield, *tr. at 57, 89*. Often, a petition for modification is opposed by the union in such cases. *See, e.g., International Union, UMWA v. Federal Mine Safety and Health Admin.* 920 F.2d 960 (D.C. Cir. 1990); *International Union, UMWA v. Federal Mine Safety and Health Admin.* 924 F.2d 340 (D.C. Cir. 1991).

Pursuant to Section 101(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 811(c), it is **ORDERED** that Freeman United Coal Company's Petition for Modification of the application of 30 C.F.R. § 75.33(a)(2) in the Crown III Mine is hereby:

GRANTED, conditioned upon compliance with all provisions of the Petitioner's alternative method and the terms and conditions Petitioner stipulated to at the hearing, including the following:

1. Freeman United Coal Mining Company will not cut coal simultaneously with two continuous mining machines at the Crown III Mine; the continuous miner **will not cut roof, ribs, face,** or **bottom** during the cleanup phase as it is loading out the loose coal and rock on the mine floor.

2. Pull-through curtains will be installed at all times at Freeman United Coal Company's Crown III Mine.

3. Direct, reliable radio communication, if not already employed, will be implemented between the working places when a continuous mining machine is cleaning up upwind from a continuous mining machine that is cutting coal. There will be immediate contact and no mistake as to when one miner is running and when one is not.

Contrary to the determination of the Deputy Administrator for Coal Mine Safety and Health, I do not conclude the petition to be a request for a waiver of Section 75.332(a)(2). Rather, I find the Petitioner has satisfied the burden of proof by a preponderance of the evidence as is required by 30 C.F.R. § 44.30, and is therefore entitled to a modification of the standard.

SO ORDERED.

JOHN M. VITTONE
Chief Administrative Law Judge

JMV/pmb
Washington, D.C.